

**GOODSILL ANDERSON QUINN & STIFEL  
A LIMITED LIABILITY LAW PARTNERSHIP LLP**

THOMAS BENEDICT 5018-0

*tbenedict@goodsill.com*  
Alii Place, Suite 1800  
1099 Alakea Street  
Honolulu, Hawai'i 96813  
Telephone: (808) 547-5600  
Facsimile: (808) 547-5880

**COVINGTON & BURLING LLP**

ROBERT D. WICK (*Pro Hac Vice*)

*rwick@cov.com*

EMILY JOHNSON HENN (*Pro Hac Vice*)

*ehenn@cov.com*

ANDREW SOUKUP (*Pro Hac Vice*)

*asoukup@cov.com*

1201 Pennsylvania Avenue, NW  
Washington, D.C. 20004

Attorney for Defendants  
JPMORGAN CHASE & CO. and  
CHASE BANK USA, N.A.

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF HAWAII

STATE OF HAWAII, *EX. REL.*  
DAVID M. LOUIE, ATTORNEY  
GENERAL,

Plaintiff,

vs.

JPMORGAN CHASE & CO., CHASE  
BANK USA, N.A. AND DOE

CIVIL NO. 12-00263 LEK-KSC  
(Other Civil Action)

**DEFENDANTS' JOINT SUR-  
REPLY IN FURTHER  
OPPOSITION TO PLAINTIFF'S  
MOTIONS TO REMAND AND  
FOR COSTS AND FEES FILED  
JUNE 15, 2012 [DOC. NO. 37]**

DEFENDANTS 1-20,

Defendants.

*Hearing: November 19, 2012*

*Time: 9:45 a.m.*

*Judge: Hon. Leslie E. Kobayashi*

STATE OF HAWAII, *EX. REL.*  
DAVID M. LOUIE, ATTORNEY  
GENERAL,

Plaintiff,

vs.

HSBC BANK NEVADA, N.A., HSBC  
CARD SERVICES, INC., and DOE  
DEFENDANTS 1-20,

Defendants.

CIVIL NO. 12-00266 LEK-KSC  
(Other Civil Action)

**DEFENDANTS' JOINT SUR-  
REPLY IN FURTHER  
OPPOSITION TO PLAINTIFF'S  
MOTIONS TO REMAND AND  
FOR COSTS AND FEES FILED  
JUNE 15, 2012 [DOC. NO. 38]**

*Hearing: November 19, 2012*

*Time: 9:45 a.m.*

*Judge: Hon. Leslie E. Kobayashi*

STATE OF HAWAII, *EX. REL.*  
DAVID M. LOUIE, ATTORNEY  
GENERAL,

Plaintiff,

vs.

CAPITAL ONE BANK (USA) N.A.,  
CAPITAL ONE SERVICES, LLC,  
and DOE DEFENDANTS 1-20,

Defendants.

CIVIL NO. 12-00268 LEK-KSC  
(Other Civil Action)

**DEFENDANTS' JOINT SUR-  
REPLY IN FURTHER  
OPPOSITION TO PLAINTIFF'S  
MOTIONS TO REMAND AND  
FOR COSTS AND FEES FILED  
JUNE 15, 2012 [DOC. NO. 39]**

*Hearing: November 19, 2012*

*Time: 9:45 a.m.*

*Judge: Hon. Leslie E. Kobayashi*

STATE OF HAWAII, *EX. REL.*  
DAVID M. LOUIE, ATTORNEY  
GENERAL,

Plaintiff,

vs.

DISCOVER FINANCIAL SERVICES,  
INC., DISCOVER BANK, DFS  
SERVICES, L.L.C., AMERICAN  
BANKERS MANAGEMENT  
COMPANY, INC., and DOE  
DEFENDANTS 1-20,

Defendants.

CIVIL NO. 12-00269 LEK-KSC  
(Other Civil Action)

**DEFENDANTS' JOINT SUR-  
REPLY IN FURTHER  
OPPOSITION TO PLAINTIFF'S  
MOTIONS TO REMAND AND  
FOR COSTS AND FEES FILED  
JUNE 15, 2012 [DOC. NO. 40]**

*Hearing: November 19, 2012*

*Time: 9:45 a.m.*

*Judge: Hon. Leslie E. Kobayashi*

STATE OF HAWAII, *EX. REL.*  
DAVID M. LOUIE, ATTORNEY  
GENERAL,

Plaintiff,

vs.

BANK OF AMERICA  
CORPORATION, FIA CARD  
SERVICES, N.A., and DOE  
DEFENDANTS 1-20,

Defendants.

CIVIL NO. 12-00270 LEK-KSC  
(Other Civil Action)

**DEFENDANTS' JOINT SUR-  
REPLY IN FURTHER  
OPPOSITION TO PLAINTIFF'S  
MOTIONS TO REMAND AND  
FOR COSTS AND FEES FILED  
JUNE 15, 2012 [DOC. NO. 41]**

*Hearing: November 19, 2012*

*Time: 9:45 a.m.*

*Judge: Hon. Leslie E. Kobayashi*

STATE OF HAWAII, *EX. REL.*  
DAVID M. LOUIE, ATTORNEY  
GENERAL,

Plaintiff,

vs.

CITIGROUP INC., CITIBANK, N.A.,  
DEPARTMENT STORES NATIONAL  
BANK, and DOE DEFENDANTS 1-20,

Defendants.

CIVIL NO. 12-00271 LEK-KSC  
(Other Civil Action)

**DEFENDANTS' JOINT SUR-  
REPLY IN FURTHER  
OPPOSITION TO PLAINTIFF'S  
MOTIONS TO REMAND AND  
FOR COSTS AND FEES FILED  
JUNE 15, 2012 [DOC. NO. 42]**

*Hearing: November 19, 2012*

*Time: 9:45 a.m.*

*Judge: Hon. Leslie E. Kobayashi*

**DEFENDANTS' JOINT SUR-REPLY MEMORANDUM IN FURTHER  
OPPOSITION TO PLAINTIFF'S MOTIONS TO REMAND AND FOR  
COSTS AND FEES FILED JUNE 15, 2012 [DOC. NOS. 37-42]**

Defendants CAPITAL ONE BANK (USA) NA ("COB") and  
CAPITAL ONE SERVICES, LLC, CITIGROUP, INC., CITIBANK, N.A.  
("Citibank"), and DEPARTMENT STORES NATIONAL BANK; JPMORGAN  
CHASE & CO. and CHASE BANK USA, N.A. ("Chase"); DISCOVER  
FINANCIAL SERVICES, INC., DISCOVER BANK ("Discover"), and DFS  
SERVICES, LLC; BANK OF AMERICA CORP. and FIA CARD SERVICES,  
NA ("FIA"); and HSBC BANK NEVADA, N.A. ("HSBC") and HSBC CARD  
SERVICES, INC. submit this Joint Sur-Reply Memorandum in Further Opposition  
to Plaintiff's Motions to Remand and for Costs (Doc. Nos. 37-42). This sur-reply

addresses an argument the Attorney General raised for the first time in his reply brief.

## **ARGUMENT**

### **I. THIS COURT MAY CONSIDER EXTRINSIC EVIDENCE TO DETERMINE WHETHER COMPLETE PREEMPTION EXISTS.**

To support their complete preemption removal argument, defendants attached declarations to their Notices of Removal that explain how payment protection fees extend credit to consumers. *See, e.g.*, No. 12-cv-263, Doc. 1-10 (Chase); No. 12-cv-268, Doc. 1-1 (Capital One); No. 12-cv-270, Doc. 1-7 (FIA). The declarations help demonstrate why the fees charged for payment protection plans are “interest” under the National Bank Act, a necessary element of defendants’ complete preemption argument. Plaintiffs argued for the first time in their reply brief that this Court may not consider these declarations in determining whether it has removal jurisdiction over these actions. (Reply Mem. at 16-17.) That argument is fundamentally mistaken.

When faced with a challenge to its subject matter jurisdiction, “the district court is not restricted to the face of the pleadings, but may review any evidence, such as affidavits and testimony, to resolve factual disputes concerning the existence of jurisdiction.” *McCarthy v. United States*, 850 F.2d 558, 560 (9th Cir. 1988). Courts therefore routinely consider declarations in determining

whether they have original jurisdiction or removal jurisdiction over a civil action. *See, e.g., Tobar v. United States*, 639 F.3d 1191, 1195 (9th Cir. 2011) (“Nor was it improper for the district court to consider the affidavits submitted by both parties; indeed, that is the correct procedure for jurisdictional challenges.”); *Green v. United States*, 630 F.3d 1245, 1248 n.3 (2011) (“[P]roof of jurisdictional facts may be supplied by affidavit, declaration, or any other evidence properly before the court, in addition to the pleadings challenged by the motion.”); *Ass’n of Am. Med. Colleges v. United States*, 217 F.3d 770, 778 (9th Cir. 2000) (“The district court obviously does not abuse its discretion by looking to this extra-pleading material in deciding the [jurisdictional] issue, even if it becomes necessary to resolve factual disputes.”); *Turner v. Hawaii First Inc.*, \_\_ F. Supp. 2d \_\_, 2012 WL 4903314, at \*2 (D. Haw. Oct. 15, 2012) (“[T]he court may consider evidence outside the pleadings and should not presume that the allegations of the complaint are true.”).

The cases cited by the Attorney General are not to the contrary; rather, those cases merely stand for the unremarkable proposition that under the well-pleaded complaint rule, a federal defense does not ordinarily give rise to federal question jurisdiction.<sup>1</sup> Nothing in those cases contradicts the separate principle

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<sup>1</sup> Moreover, the well-pleaded complaint rule does not apply here because the complete preemption doctrine is an “exception” to that rule. *Beneficial Nat’l Bank of Anderson*, 539 U.S. 1, 5, 6 (2003); *see also ARCO Envtl. Remediation, L.L.C. v. Dep’t of Health & Envtl. Quality of Montana*, 213 F.3d 1108, 1114 (9th Cir. 2000)

that a party may offer factual evidence to demonstrate the existence of federal jurisdiction where, as here, that evidence is offered “to clarify that a plaintiff’s state law claim is one that would be [completely] preempted by federal law.”

*Eggert v. Britton*, 223 F. App’x 394, 397 (5th Cir. 2007); *see also Peters v. Lincoln Elec. Co.*, 285 F.3d 456, 468-69 (6th Cir. 2002) (examining deposition testimony to conclude that state-law claim was completely preempted by ERISA).

If the law were otherwise, the Attorney General could defeat an otherwise meritorious complete preemption removal argument merely by making false and erroneous factual allegations about whether defendants’ payment protection plans extend credit to consumers. As demonstrated above, that is not the law. This Court can and should consider defendants’ declarations in determining whether it has jurisdiction over this action.

### **CONCLUSION**

For these reasons and the reasons set forth in Defendants’ opposition, the Motions to Remand should be denied.

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(“[A] plaintiff may not defeat removal by omitting to plead necessary federal questions in a complaint.”).

DATED: Honolulu, Hawai'i, November 14, 2012

/s/ Thomas Benedict

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THOMAS BENEDICT

ROBERT D. WICK (*Pro Hac Vice*)

EMILY JOHNSON HENN

(*Pro Hac Vice*)

ANDREW SOUKUP (*Pro Hac Vice*)

Attorneys for Defendants

JPMORGAN CHASE & CO. AND

CHASE BANK USA, N.A.

/s/ Andrew L. Pepper

---

ANDREW L. PEPPER

MARGERY S. BRONSTER

JAMES F. MCCABE (*Pro Hac Vice*)

JAMES R. MCGUIRE (*Pro Hac Vice*)

Attorneys for Defendants

CAPITAL ONE BANK (USA), N.A.

AND CAPITAL ONE SERVICES, LLC



/s/ Michael Purpura

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MICHAEL PURPURA  
MICHAEL J. SCANLON  
EDWARD SHERWIN (*Pro Hac Vice*)  
ROBERT W. TRENCHARD (*Pro Hac Vice*)

Attorneys for Defendants  
CITIGROUP INC., CITIBANK, N.A.,  
AND DEPARTMENT STORES  
NATIONAL BANK

/s/ John P. Manaut

---

JOHN P. MANAUT  
LINDSAY N. MCANEELEY  
WILLIAM MATSUJIRO HARSTAD  
JASON SUNG-HYUK YOO  
JULIA B. STRICKLAND (*Pro Hac Vice*)

Attorneys for Defendants  
DISCOVER FINANCIAL SERVICES,  
INC., DISCOVER BANK, AND DFS  
SERVICES, L.L.C.

/s/ Patricia J. McHenry

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PATRICIA J. MCHENRY  
WILLIAM K. SHULTZ  
DAVID L. PERMUT (*Pro Hac Vice*)

Attorneys for Defendants  
BANK OF AMERICA  
CORPORATION AND FIA CARD  
SERVICES, N.A.

/s/ Michael C. Bird

---

MICHAEL C. BIRD

SUMMER H.M. FERGERSTROM

TRACEY LYNN KUBOTA

JASON SUNG-HYUK YOO

DAVID W. MOON (*Pro Hac Vice*)

JULIA B. STRICKLAND (*Pro Hac Vice*)

Attorneys for Defendants

HSBC BANK NEVADA, N.A. AND

HSBC CARD SERVICES, INC.